

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 32

UNITED STATES PATENT AND TRADEMARK OFFICE

---

BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

---

Ex parte PAUL T. VAN GOMPEL, JOYCE A. DAMICO,  
JACQUELINE A. GROSS, VERONICA M. LINGNOWSKI,  
PATRICIA A. MITCHELER, JOHN G. RAJALA, SHELLEY R.  
RASMUSSEN, MARK S. SCHRADING, PAUL D. SUKE, JODY  
D. SUPRISE

---

Appeal No. 1998-2262  
Application 08/745,303<sup>1</sup>

---

ON BRIEF

---

Before COHEN, FRANKFORT, and McQUADE, Administrative Patent Judges.

McQUADE, Administrative Patent Judge.

DECISION ON APPEAL

Paul T. Van Gompel et al. appeal from the final rejection

---

<sup>1</sup>Application for patent filed November 12, 1996 under 37 CFR § 1.62 as a file wrapper continuation of Application 08/263,229, filed June 21, 1994, now abandoned.

Appeal No. 1998-2262  
Application 08/745,303

of claims 33 through 90, all of the claims pending in the application. We affirm-in-part.

The invention relates to "women's disposable undergarments having a fluid repellent region and an absorbent layer to be used with a woman's normal feminine care protection during her menstrual period" (specification, page 1). A copy of claims 33 through 90 appears in the appendix to the appellants' brief (Paper No. 27).<sup>2</sup>

The references relied upon by the examiner as evidence of obviousness are:

Southwell	4,560,381	Dec.
24, 1985 Tanzer et al. (Tanzer)	5,425,725	
Jun. 20, 1995		
	(filed Jan. 29, 1993)	
Watanabe et al. (Watanabe)	5,449,353	Sep. 12,
1995		
	(filed Oct. 1,	
	1993)	
Horney	5,599,339	Feb. 4,
1997		

---

<sup>2</sup>The terms "said waist opening" in claims 43 and 44 and "said secondary absorbent" in claim 52 lack a proper antecedent basis. These informalities are deserving of correction in the event of further prosecution before the examiner.

Appeal No. 1998-2262  
Application 08/745,303

(filed Oct. 31,

1995)

Saisaka et al. (Saisaka) 29, 1997	5,624,424	Apr.
--------------------------------------	-----------	------

(filed Feb. 21, 1995)

Igaue et al. (Igaue) 1987 British Patent Document	2,189,133	Oct. 21,
---	-----------	----------

Suzuki et al. (Suzuki) 1990 European Patent Document	0,403,832	Dec. 27,
--	-----------	----------

Igakami et al. (Igakami) <sup>3</sup> 1992 Japanese Patent Document	04289201	Oct. 14,
---	----------	----------

Kitaoka 1992 Japanese Patent Document <sup>3</sup>	4-371147	Dec. 24,
--	----------	----------

Claims 33 through 90 stand rejected under 35 U.S.C. § 103  
as follows:

a) claims 33 through 43, 45 through 61 and 63 as being  
unpatentable over Southwell in view of Suzuki, Tanzer and

---

<sup>3</sup>An English language translation of this reference,  
prepared on behalf of the Patent and Trademark Office, is  
appended hereto.

Appeal No. 1998-2262  
Application 08/745,303

Igaue;

b) claims 44 and 62 as being unpatentable over Southwell in view of Suzuki, Tanzer, Igaue and Kitaoka;

c) claims 64 through 70 and 72 through 76 as being unpatentable over Southwell in view of Suzuki, Tanzer, Igaue, Kitaoka and Watanabe;

d) claim 71 as being unpatentable over Southwell in view of Suzuki, Tanzer, Igaue, Kitaoka, Watanabe and Igakami;

e) claims 77 through 79, 82 through 84 and 86 as being unpatentable over Saisaka in view of Tanzer; and

f) claims 80, 81, 85 and 87 through 90 as being unpatentable over Saisaka in view of Tanzer and Horney.

Reference is made to the appellants' brief (Paper No. 27) and to the examiner's answer (Paper No. 28) for the respective positions of the appellants and the examiner with regard to the merits of these rejections.

Southwell, the first of the examiner's primary references, discloses "a protective, lightweight, disposable

woman's hygienic panty for removably carrying a feminine napkin during a woman's menstrual cycle or period" (Abstract). Representative of such panties are the closely related embodiments shown in Figures 1 through 5. These panties include a body portion 22, a waist portion 23, a crotch portion 24 and leg portions 25. The waist and leg portions define body and leg openings 29, 36 which are bounded by ribbon-like elastic or rubber bands 31, 37 to accommodate women of various sizes. The exterior of the panty consists of a thin shell or outer layer 49, 54 of mesh-like material which may completely encase the body and crotch portions. The lower body portion 27 carries over its entire inner surface a relatively thick, highly absorbent layer 51. The absorbent layer includes an elongated indentation 43 in the

crotch portion for receiving a conventional feminine napkin or pad. The bottom 57 of the indentation lies proximate the outer shell or an interposed waterproof layer 55 (see Figure

5) which prevents moisture leakage/seepage.

Southwell does not meet the limitations in independent claim 33 requiring the recited disposable panty to include leg openings each having a back edge portion which in a flat blank configuration of the panty extends rearwardly from the crotch portion along an "essentially linear" path over a majority of the length of the back edge portion.<sup>4</sup> This feature is disclosed as playing an important role in achieving proper leg fit and buttocks coverage (see pages 12 and 13 in the specification). Notwithstanding the examiner's apparent finding to the contrary (see page 5 in the answer), the corresponding back edge portions in Southwell's panty extend along circular or oval paths (see Figure 2 and column 7, lines 13 through 15), not essentially linear paths. The examiner's reliance on Igaue (the British reference) as also showing back edge portions extending along essentially linear paths (see page 5 in the answer) is similarly unsound. Igaue's back edge

---

<sup>4</sup>Based on the underlying specification (see, for example, the first paragraph on page 13) and consistent with the arguments of counsel (see page 7 in the brief), we understand the "essentially linear" terminology in claim 33 to mean --essentially straight--.

portions actually extend along paths which are semi-elliptic (see page 3, lines 35 through 41; and Figures 3 and 5). Thus, the prior art applied in the manner proposed by the examiner would not have suggested the subject matter recited in independent claim 33.

Accordingly, we shall not sustain the standing 35 U.S.C. § 103 rejection of claim 33, or of claims 34 through 43 and 45 through 54 which depend therefrom, as being unpatentable over Southwell in view of Suzuki, Tanzer and Igaue, or the standing 35 U.S.C. § 103 rejection of claim 44, which depends from claim 33, as being unpatentable over Southwell in view of Suzuki, Tanzer, Igaue and Kitaoka.

Southwell also fails to meet the limitations in independent claim 55 requiring the recited disposable panty to include an absorbent barrier composite which is mounted across the width of the crotch portion and has a generally uniform thickness and a limited capacity for absorbing no more than about 6 grams of liquidous exudates. The examiner's apparent finding (see page 6 in the answer) that Southwell's "absorbent barrier" 51 has a generally uniform thickness is at odds with

the presence of the indentation 43 in the crotch area. Moreover, the examiner has failed to provide any factual support for the conclusion (see page 7 in the answer) that it would have been obvious to one of ordinary skill in the art to provide Southwell's "barrier" 51, which is disclosed as being highly absorbent, with a limited capacity for absorbing no more than about 6 grams of liquidous exudates. As disclosed (see specification page 6), this limited absorption capacity contributes to a non-bulky and flexible fit for the claimed panty. For these reasons, the prior art applied in the manner proposed by the examiner would not have suggested the subject matter recited in independent claim 55.

Hence, we shall not sustain the standing 35 U.S.C. § 103 rejection of claim 55, or of claims 56 through 61 and 63 which depend therefrom, as being unpatentable over Southwell in view of Suzuki, Tanzer and Igaue, or the standing 35 U.S.C. § 103 rejection of claim 62, which depends from claim 55, as being unpatentable over Southwell in view of Suzuki, Tanzer, Igaue and Kitaoka.



Southwell does meet all of the limitations in independent claim 64 except for those requiring the recited disposable panty to include body elastic attached to the panty in a stretched condition, positioned between the waist elastic and the leg openings and extending circumferentially about the panty such that the body elastic can stretch in the circumferential direction when the panty is put on and retract about the body of the wearer when released with the retractive forces being distributed generally uniformly about the panty to thereby closely conform the front and back body portions of the panty to the shape of the wearer's body between the waist elastic and the leg openings. The Southwell panty has no such body elastic. Nonetheless, the examiner's reliance on Kitaoka and Watanabe to cure this deficiency is well founded.

Kitaoka discloses disposable underpants having body elastic in the form of uniformly spaced elastic strands 9a, 9b positioned over the entire area between a waist elastic 7 and leg openings 3 and extending circumferentially about the panty such that the body elastic can stretch in the circumferential

direction when the panty is put on and retract about the body of the wearer when released. Watanabe discloses a disposable diaper having body elastic in the form of uniformly spaced elastic yarns 16a, 16b positioned between a waist elastic 8a, 8b and leg openings 10a, 10b and extending circumferentially about the panty such that the body elastic can stretch in the circumferential direction when the panty is put on and retract about the body of the wearer when released. The purpose of the body elastic in each of these references is to improve the fit of the undergarment/diaper. These teachings would have provided the artisan with ample suggestion or motivation to employ body elastic of the sort recited in claim 64 in the Southwell panty for an improved fit. Notwithstanding the appellants' arguments to the contrary (see page 16 in the brief), the Southwell panty as so modified would meet the relatively broad requirements in claim 64 that the body elastic provide retractive forces distributed generally uniformly about the panty to thereby closely conform the front and back body portions of the panty to the shape of the wearer's body between the waist elastic and the leg openings.

For the same reasons, and again notwithstanding the appellants' arguments to the contrary (see page 16 in the brief), the proposed combination of Southwell, Kitaoka and Watanabe would have suggested a panty having the body elastic features recited in dependent claim 69.

Thus, the differences between the subject matter recited in claims 64 and 69 and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art.

Therefore, we shall sustain the standing 35 U.S.C. § 103 rejection of claims 64 and 69 as being unpatentable over Southwell in view of Suzuki, Tanzer, Igaue, Kitaoka and Watanabe.

We also shall sustain the standing 35 U.S.C. § 103 rejection of claims 65 through 68, 70 and 72 through 76, which ultimately depend from claim 64, as being unpatentable over Southwell in view of Suzuki, Tanzer, Igaue, Kitaoka and

Appeal No. 1998-2262  
Application 08/745,303

Watanabe since the appellants have not challenged such with any reasonable specificity, thereby allowing these claims to stand or fall with claim 64 (see In re Nielson, 816 F.2d 1567, 1572, 2 USPQ2d 1525, 1528 (Fed. Cir. 1987)).

Claim 71 depends from claim 64 and requires, inter alia, a waist elastic comprising threads. The appellants' contention (see page 17 in the brief) that the obviousness rejection of this claim is flawed because the Igakami reference discloses a waist elastic composed of ribbons rather than threads is not persuasive. Watanabe's disclosure (see column 6, lines 56 through 60) that waist elastic 8a, 8b can be in the form of belts (i.e., ribbons/bands) or yarns (i.e., threads) would have suggested the substitution of elastic threads for Southwell's waist elastic bands 31.

Accordingly, we shall sustain the standing 35 U.S.C. § 103 rejection of claim 71 as being unpatentable over Southwell in view of Suzuki, Tanzer, Igaue, Kitaoka, Watanabe and Igakami.

Finally, we shall not sustain the standing 35 U.S.C. §

Appeal No. 1998-2262  
Application 08/745,303

103 rejection of claims 77 through 79, 82 through 84 and 86 as being unpatentable over Saisaka in view of Tanzer or the standing 35 U.S.C. § 103 rejection of claims 80, 81, 85 and 87 through 90 as being unpatentable over Saisaka in view of Tanzer and Horney.

As correctly pointed out by the appellants (see pages 17 through 19 in the brief), the effective filing date (June 21, 1994) of the instant application, and thus of the subject matter recited in claims 77 through 90, is earlier than the effective filing dates of the Saisaka (February, 21, 1995) and Horney (October, 31, 1995) patents. Consequently, these patents are not prior art with respect to the subject matter recited in claims 77 through 90. As a result, the examiner's conclusions of obviousness which are predicated on these patents must fall.

In summary, the decision of the examiner to reject claims 33 through 90 under 35 U.S.C. § 103 is affirmed with respect to claims 64 through 76 and reversed with respect to claims 33 through 63 and 77 through 90.

Appeal No. 1998-2262  
Application 08/745,303

No time period for taking any subsequent action in  
connection with this appeal may be extended under 37 CFR  
§ 1.136(a).

AFFIRMED-IN-PART

Irwin Charles Cohen	)	
Administrative Patent Judge	)	
	)	
	)	BOARD OF PATENT
Charles E. Frankfort	)	
Administrative Patent Judge	)	APPEALS AND
	)	
	)	INTERFERENCES
	)	
John P. McQuade	)	
Administrative Patent Judge	)	

Appeal No. 1998-2262  
Application 08/745,303

JPM:pgg  
Thomas D. Wilhelm  
100 W. Lawrence  
Third Floor  
Appleton, WI 54911